No. 579 116

Supreme Court of the United States,

OCTOBER TERM, 1922.

THE QUEEN INSURANCE COMPANY OF AMERICA,
(Libellant below),

Petitioner,

—against—

GLOBE & RUTGERS FIRE INSURANCE COMPANY,
(Respondent below),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
GEORGE S. BRENGLE.
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of The Queen Insurance Company of America, a New York corporation, alleges and respectfully shows to this Honorable Court as follows:

The decision which this petition seeks to review was rendered on the 5th day of June, 1922, by the Circuit Court of Appeals for the Second Circuit, in affirming a final decree rendered on the 20th day of March, 1922, by the United States District Court for the Southern District of New York.

The issue involved in the case is whether loss of the cargo of the Italian steamship "Napoli," which was sunk in the Mediterranean on July 4th, 1918, while proceeding under the convoy of British, Italian and American warships, should be borne by marine underwriters or war

risk underwriters. The issue is one of far-reaching importance, both from the commercial standpoint and from the standpoint of international law. It has never been directly passed on by this Court.

The facts are as follows: Just before midnight on July 4th, 1918, two convoys, one consisting of some twenty vessels and the other of some eighteen vessels, met almost head on in the Mediterranean, at a point half way between the coasts of Corsica and France. The convoys were approaching each other, without lights, at a combined speed of approximately 15 knots an hour, and did not become aware of each other until they were approximately 3000 feet apart. Three collisions resulted, including the collision between the Italian Steamship "Napoli," in the East bound convoy, and the British Steamship "Lamington," in the West bound convoy, out of which this case arose. The "Napoli" sank about an hour after the collision and both the vessel and her cargo became a total loss.

A large part of the cargo of the "Napoli" consisted of war materials and supplies (Record, fols. 694-719). The cargo for the most part was insured against both war and marine risks, in some cases both risks being placed with one Insurance Company and in others the marine risk being placed with one Company and the war risk being carried by another Company, or by one of the Government War Risk Bureaus. The question arose as to whether the loss of the cargo of the "Napoli" should be regarded as the result of a war risk or of a marine risk. Most of the marine and war risk underwriters paid one-half of the amount insured by them, each set of underwriters taking an assignment of the assured's rights against the other set. In the present case, which is a test suit, the petitioner insured a shipment of asbestos fibre, consigned to the British Consul, against marine risks (Record, p. 12), and the respondent insured the same shipment against the usual war risks (Record, p.

14). Each Company paid one-half of the amount insured by it, without prejudice, and took an assignment of the beneficial interest of the assured against the other (fols. 43-50). The present suit was brought by the Company insuring the marine risk to recover the unpaid balance of the war risk policy.

At the time the collision occurred, July 4, 1918, the war was at an acute stage and the German unrestricted submarine warfare was at its height. The convoy system had been adopted as the only effective way of meeting the submarine peril and all merchantmen, with the exception of a very few fast liners like the "Leviathan" and the "Aquitania," were navigating in the war zone only in convoy. As Judge Hough, who decided the case in the District Court said (fol. 736):

> "It is an inference easily made from what is proven, that she (the "Napoli") would have run far greater danger by avoiding a convoy than by joining one; she sought the protection of a convoy, and so did all the other well advised vessels of no greater speed than the "Napoli" possessed, (12 knots)."

The two convoys of which the "Napoli" and "Lamington" formed parts, following the uniform practice in the Mediterranean, were made up under the direction of the naval authorities respectively at the British naval base of Gibraltar and the Italian army base of Genoa. The warships with each convoy were under the command of the Senior Officer on the warships, and each convoy had a naval officer as Commodore of Convoy, who sailed on one of the merchantmen. The entire convoy, both merchantmen and warships, was considered as a unit and was in command of the Senior Naval Officer, who might be either the Commodore of Convoy or the Senior Commanding Officer of the escorting vessels, whichever happened to be the senior (fols. 533, 583, 589).

The eastbound convoy, of which the Steamship "Napoli" formed a part, was bound from Gibraltar for Genoa. It consisted of twenty ships (of which two or three left the convoy before the collision and proceeded to Marseilles) (fol. 506). The escorting warships were H. M. S. "Jeannette II," commanded by Captain Ryan, who was the senior naval officer of the convoy, the British Trawler "Algol," the Italian Auxiliary "Tocra," and the U. S. S. "Castine," commanded by Captain Asserson, U. S. N. The convoy left Gibraltar on June 30th, 1918 (fol. 505). The Commodore of Convoy was Commander Ignasio of the Italian Navy on board the S. S. "Napoli" (fol. 505). The "Napoli" was in the middle of the front line of the convoy (Bologna p. 155, Q. 22). The lines of vessels were about 600 yards apart (fols. 538, 614). The convoy had a frontage of a little less than two miles and was in this formation when the collision occurred.

The westbound convoy, of which the "Lamington" formed a part, was convoyed by the U. S. S. "Yankton" commanded by Captain Burns, U. S. N., who was the senior naval officer of the convoy, the Italian Naval Auxiliary "Citti di Ben Gazi," the Italian Destroyer "Granatierre," and the British Trawler "Achenar." The Commodore of the Convoy was on the "Ansaldo III." The convoy formed outside of Genoa at 10:30 A. M. July 4th, and consisted of eighteen merchant ships—a front line of eight ships, a second line of seven ships, and a third line of three ships (p. 85). The convoy had a frontage of a little more than two miles and the three lines were approximately 400 yards apart. The convoy was in this formation at the time of the collision, and the "Lamington" was near the center of the second line.

Both the "Napoli" and the "Lamington" convoys received secret sailing instructions before leaving the naval base. These instructions emanated from the naval authorities in command respectively at Genoa and Gibraltar (fols. 507-8). The Senior Naval Officer of each convoy

had discretionary authority to vary the sailing orders as circumstances might require, and the detailed navigation was prescribed from time to time by the naval officers in the convoy. The specific sailing instructions of the westbound convoy are set out at page 83 of the record and those of the eastbound convoy at page 29.

No freedom of navigation whatever was permitted the merchantmen in either convoy. Their navigation was prescribed in three ways:

(1) By the sailing orders issued at the base from which they started (fols. 507-8, 513, 655; Exhibits 1, p. 28, and 5, p. 81);

(2) By the Commodore of Convoy and the Senior Naval Officer (fols. 533, 544, 583); and

(3) By certain general British convoy regulations as to lights, etc. (fols. 515, 524).

Thus the naval authorities prescribed, in one or another of these ways:

(1) The course of each convoy (fols. 513, 514, 539, 581, 583, 589 and pp. 29, 83).

(2) The speed of the convoys (fols. 590, 545-6, 548 and p. 83).

(3) The arrangement of the vessels in tiers and columns (fols. 524, 541 and p. 82).

(4) Their distance apart (fol. 613 and p. 83).

(5) When to zigzag and the exact zigzag to be followed (fols. 542-4).

(6) That no lights must be shown except in great emergency (fol. 382, pp. 160-1, Q. 145-7, fol. 522).

(7) As Captain Asserson said, the Senior Naval Officer was in "command of the entire convoy, merchant as well as naval vessels" (fol. 533) and even matters of immediate navigation such as porting and starboarding were prescribed by the Commodore of Convoy (fol. 541).

The eastbound, or "Napoli" convoy, followed the prescribed route, but slightly east of the exact course laid down in the sailing orders, and was about twenty-four hours ahead of schedule at the time of the collision, on orders from the Senior Naval Officer (fol. 548).

The westbound, or "Lamington" convoy followed her prescribed course until about five hours before the collision. At that time one of the ships in this convoy was sunk by a submarine and as a result of this submarine attack the course was changed twice under orders from the Commodore of the Convoy (Record, p. 85; Record, fols. 584-585). It is accordingly clear that the courses laid down in the sailing instructions, together with the detailed orders of navigation given during the voyage of the two convoys by the Senior Naval Officer and Commodore of Convoy, brought the two convoys into collision.

The collision occurred at 11:38 P. M. The convoys met almost head on and did not become aware of each other's presence until the front lines of each convoy were approximately 1000 yards apart. As they were approaching each other at a combined speed of 15 knots (fol. 752; p. 155, Q. 26), there was only from two to three minutes of time for manoeuvering. The lights were immediately turned on and the vessels of each convoy endeavored to navigate between the vessels of the other. It was a case

of each ship for itself, and in the words of Judge Mayer of the Circuit Court of Appeals in his concurring opinion

> "The situation which developed was so unexpected, confusing and exciting as to invite for its description the pen of a Conrad" (Record, fol. 879).

The "Napoli," which was in the front line of the eastbound convoy, successfully manoeuvered between two of the vessels in the front line of the westbound convoy, but collided with the "Lamington" in the second line of that convoy and as a result of the collision sank with all of her cargo.

The collision between the "Napoli" and the "Lamington" has been the basis of a judicial decision in England. A libel was filed in England on behalf of the cargo of the "Napoli" against the "Lamington," and was tried in July, 1921, resulting in the dismissal of the libel. Mr. Justice Hill, whose opinion is printed as Exhibit 20 (fol. 670, et seq.) said (fol. 690):

> "It seems to me to be quite clear that this is one of those cases in which two convoys, unlighted, suddenly became aware of one another's presence at a very close distance, became greatly confused in their formation, and in their efforts they made to avoid one another, without any fault on the part of anybody, the collision took place."

The Elder Brethren of Trinity House concurred in this decision and it is in accord with the findings of the Italian Court of Inquiry appointed by the Ministry of Marine (fols. 434, 435).

The present case was tried in the District Court for the Southern District of New York before Judge Hough, who held that neither the "Napoli" nor the "Lamington" were entirely free of fault, but stated that the *causa causans* of all of the collisions which occurred when the

two convoys met, was the "total disregard of each convoy for the other" (fol. 768), and that an

> "important navigator's fault lay with the Senior Naval Officers of both convoys for failing to take any steps to prevent just such a meeting as did occur" (fol. 771).

Judge Hough decided the case, however, on the broad general ground that sailing in convoy at night without lights was not a warlike operation or an act done in the prosecution of hostilities, even though the convoyed vessel was carrying war supplies and munitions; and that consequently the loss of the "Napoli" and her cargo was not the result of a war risk. Judge Hough decided the case as he did against his own judgment, feeling bound by two decisions in the British House of Lords.

The Circuit Court of Appeals for the Second Circuit affirmed the decision of the Lower Court. Judge Manton, who wrote the opinion of the Court, held that neither—(1) sailing in convoy nor (2) sailing at night without lights under Admiralty orders, nor (3) the transportation of munitions of war, nor all three combined, amounted to a warlike operation or an act done in the prosecution of hostilities, and that accordingly, the collision, which was admittedly the result of sailing in convoy without lights, was not caused by a war risk. Judge Manton also relied upon the two House of Lords decisions, which were the basis of the District Court's decision. Judge Rogers concurred in the result. Judge Mayer, in a concurring opinion, agreed with the District Court in holding, as a matter of principle and sound reasoning, that sailing in convoy was a warlike operation and an act done in the prosecution of hostilities, but stated that in his opinion, "no Court of less authority than that of the Supreme Court of the United States should arrive at a result different from that reached by the House of Lords," on an issue as important as that involved in this case (fol. 885).

Your petitioner respectfully submits that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons, among others:

First: The question of what constitutes a war risk as opposed to a marine risk, in marine insurance, is one of great commercial importance. It has been considered in one form or another in at least six cases by the British House of Lords. It has not been discussed or passed upon by this Court. No more important commercial question has been raised by the World War, than that involved in the present case.

Second: Two of the three judges who have written opinions in the present case have specifically stated that in their opinion the decision at which they arrived was opposed to sound principle and reason. They decided the case as they did solely because of two decisions of the British House of Lords, by which they felt bound.

Judge Hough said (fols. 790-4, 797, 804):

> "It would be a professional pleasure to feel at liberty to treat both these questions from what I regard as the standpoint of reason; but I do not think that pleasure can be accorded. * * *. The important thing is to secure uniformity of view in a commercial world which now embraces and long has included more than one continent and more than one ocean. I shall therefore, briefly state my own view and decide this case on what I conceive to be authority.
>
> My own view in this matter is that of Bailhache, J., expressed in *The Petersham* (*Britain, etc. Co.* v. *The King* (1919) 1 K. B., 575 (580); and *The Matiana* (*British, etc. Co.* v. *Green* (1919) 1 K. B., 632 (636), viz:
>
> 'However peaceful the immediate business upon which a ship is engaged—if she is sailing

> as one of a convoy she is engaged, in my opinion, in a warlike operation. The assembling, presence, protection and movements of the King's ships protecting the convoy are a warlike operation, and both convoyed and convoying ships are taking part in it, and that character attaches to the whole flotilla and covers the whole operation.'
>
> * * * This I think to be the large and commonsense view of the situation. * * * For these reasons I agree in principle with Bailhache, J., and particularly sympathize with the defiance flung by him at the reasoning of *The Ionides* case, *supra,* indicated in the last of the above quotations.
>
> But the spirit of *The Ionides* decision triumphed when the *Matiana* and *Petersham* cases had gone through the Court of Appeals (1919, 1 K. B., 670) and received final treatment in the House of Lords (1921, 1 A. C., 99).
>
> * * * It must be held under authority, to which for business purposes the Courts of the United States should conform, that the collision in question was not proximately caused by any act of hostility or by the consequences thereof."

Judge Mayer, in his concurring opinion in the Circuit Court of Appeals, said:

> "The theory of this case should be that "a warlike operation" is not confined to actual offense, attack or armed engagement but may, in any event, comprehend a movement of vessels initiated in accordance with sovereign compulsion for the purpose of delivering munitions and supplies either to one's own country or to allies or associates.
>
> * * * Yet, whatever our own views may be, I think the District Court, per Hough, J., was right in recognizing the commercial necessity of following the *Petersham* and *Matiana* cases, decided by the House of Lords by the narrow margin of three to two.
>
> The questions in the case at bar are not local but affect an important class of world wide busi-

> ness in which the relations are so interwoven and connected that it would be unfortunate and confusing if a court of less authority than the Supreme Court of the United States were to arrive at a result different from that reached by the House of Lords" (Record, fols. 883, 884, 885).

Both Judge Hough and Judge Mayer decided the case against their own best judgment, feeling that

> "it would be unfortunate and confusing if a court of less authority than the Supreme Court of the United States were to arrive at a result different from that reached by the House of Lords" (Record, fol. 885).

even though in their opinion the House of Lords was wrong.

Third: This Court has already stated, as will be shown in the brief in support of this petition, that

> "A convoy is an association for a hostile object,"

and, in effect, that the sailing of a merchantman with a convoy in time of war is a warlike operation. This Court has, accordingly, already adopted a principle diametrically opposed to the rule which was the basis of the two decisions of the House of Lords, on the authority of which the present case was decided, both by the District Court and the Circuit Court of Appeals.

Fourth: The present case, viewed in its larger aspects, involves not merely the law of marine insurance, but principles of International law, upon which text writers have differed and which have been the basis of controversies between this nation and foreign governments; viz., the question of the status of merchant vessels in convoy. This question is essentially justiciable rather than diplomatic and it is respectfully submitted that it should be decided by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Circuit Court of Appeals to certify and send to this Court on a day certain to be designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in this connection, which was entitled in that Court: "The Queen Insurance Company of America, Libellant-Appellant v. The Globe & Rutgers Fire Insurance Company, Respondent-Appellee," to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just, and that the said decree of the Circuit Court of Appeals may be reversed by this Honorable Court.

Dated, September 1st, 1922.

THE QUEEN INSURANCE COMPANY OF AMERICA,

JOHN E. HOFFMAN,
Petitioner.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
GEORGE S. BRENGLE,
Of Counsel.

State of New York,
County of New York—ss.:

JOHN E. HOFFMAN, being duly sworn, deposes and says:

That he is the manager of Marine Department of THE QUEEN INSURANCE COMPANY OF AMERICA, the petitioner herein; that he has read the foregoing petition, and that the same is true as he verily believes.

JOHN E. HOFFMAN.

Sworn to before me this
1st day of September, 1922.

JOHN J. CLARKE,
Notary Public,
New York County.
New York County Clerk's No. 230.
Commission expires March, 1924.

I hereby certify that I have read the foregoing petition and, in my opinion, it is well founded and deserves the favorable consideration of this Court.

D. ROGER ENGLAR,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1922.

THE QUEEN INSURANCE COMPANY OF AMERICA,
(Libellant below),

Petitioner,

—against—

GLOBE & RUTGERS FIRE INSURANCE COMPANY,
(Respondent below),

Respondent.

BRIEF FOR PETITIONER.

The facts are summarized in the Petition. They are also set out in the opinions of the District Court and the Circuit Court of Appeals (fols. 727, *et seq.;* fols. 832, *et seq.*).

The facts which should be particularly noted are: that the collision took place on a dark night, between vessels forming parts of two huge convoys, which were approaching each other without lights at the combined rate of fifteen knots an hour, and that the presence of neither convoy was known to the other until they were approximately 1000 yards apart; that the two convoys were under the protection of a large number of warships and were under the complete control of naval officers, who not merely directed the routes that each should follow, but directed and controlled the manouvres of navigation, even to the porting and starboarding of the vessels; that the "Napoli" was carrying materials for use in the war; that both the convoy system and the practice of sailing without lights were adopted as war measures, necessary to the defeat of Germany and her allies, in view of the unrestricted submarine war-

fare; and that the collision occurred as the direct and proximate result of sailing in convoy without lights and in the course of voyages whose routes were prescribed by the naval authorities. The regulations under which the convoys were proceeding had the legal status of law and the sanction of force behind them. The convoys were proceeding under the British regulations, and all vessels in convoy were subject to the British Naval Discipline Act of 1886. This is well pointed out by Lord Shaw in the case of *The Matiana* (1921), 1 A. C. at pp. 123-4.

The cause of the collision between the "Napoli" and the "Lamington" has been discussed and passed upon by four Judges in three Courts, by the Elder Brethren of Trinity House, and by a Court of Inquiry consisting of four Naval Officers appointed by the Italian Ministry of Marine.

Judge Hough, before whom the present case was tried in the District Court, held that both the "Napoli" and the "Lamington" were guilty of faulty navigation but made it clear that in his opinion such faulty navigation was not the proximate cause of the loss. In the course of his opinion, Judge Hough said:

> "In my opinion the *causa causans* of all of the collisions of that night was the total disregard by each convoy of the other"; (Record, fol. 768).
>
> * * * * * * * *
>
> "It follows that in my opinion a certain and important navigator's fault lay with the senior naval officers of both convoys in failing to take any steps to prevent just such a meeting as did occur. But this latter fault (assuming it now to exist) raises a question which is one of law, viz.: whether such careless navigation on the part of the *convoyers* produced a risk for which protection must be sought under the policy of the libellant rather than that of the respondent" (fols. 771, 772).

Judge Hough held it did not, because, as will be shown hereafter, under the British decisions on which he relied, a distinction is drawn between the status of the convoyed merchantman and the convoying warships. This distinction has been rejected in this country by this Court.

Judge Manton of the Circuit Court of Appeals adopted the views of Judge Hough in this regard (Record, fol. 871).

Judge Mayer, however, in a concurring opinion in the Circuit Court of Appeals, rejected any theory of faulty navigation and held that any errors of navigation

> "must be regarded as having been committed *in extremis* in a situation so unexpected, confusing and exciting as to invite for its description the pen of a Conrad" (Record, fol. 879).

Mr. Justice Hill, sitting in the Admiralty Division of the King's Bench in the British case brought by the owners of the "Napoli" cargo against the "Lamington" held that the collision occurred

> "without any fault on the part of anybody" (Record, fol. 690).

The Elder Brethren of Trinity House, two of whom, Captain A. W. Clarke, K. B. E., and Captain Owen Jones, C. B. E., sat with Mr. Justice Hill in the decision of the case, concurred in finding that both vessels were without fault.

The Italian Court of Inquiry, appointed by the Italian Ministry of Marine, and consisting of four Naval Officers, also held that the collision between the "Napoli" and the "Lamington" did not result from the fault of either vessel, and said:

> "Owing to the short distance between the two convoys, the courses whereof were bringing them

> to meet * * * it was not possible for the two convoys to manoeuvre and bear at the same time to the convenient side in order to avoid a collision. Nor was it possible to stop the two convoys, because in the instructions given no provisions was made for a luminous emergency signal to order such a maneouvre.
>
> "No general manoeuvre, on the other hand, being possible, each Commander manoeuvred separately endeavoring to avoid the collision" (fols. 418-9).
>
> "The Commission, however, feel it their duty to point out the circumstances under which the manoeuvres in question had to be executed and are of opinion that the anxiety of the Commanders must have been very great because, besides having to avoid the steamers ahead, they had also to see to avoid being struck by those astern. Moreover the sudden appearing of so many lights, the noise of so many sound signals directing the manoeuvres must necessarily have generated a confusion which was entirely to the disadvantage of the necessary calm which every Commander had to preserve in order to avoid collisions which appeared impending from all sides" (fols. 434-5).

Although the question whether any negligence in the navigation of the individual ships contributed to the collision, was discussed at some length by the lower Courts, neither of these Courts based its decision on a finding that there was such negligence The lower Courts decided the case solely on the ground that the collision (quite apart from any question whether there was faulty navigation on the part of either vessel involved) was not the result of a war risk. Accordingly the question whether the navigation of the "Napoli" or "Lamington" is subject to criticism is only of collateral importance in considering the real issue involved. It is clear that the collision was due primarily and proximately to the system under which the two convoys were operated—a system which was adopted as a war measure

and as the most essential means of combating the German submarine campaign and thereby bring about the defeat of Germany.

The Insurance Policies issued by the Petitioner and the Respondent.

The marine policy issued by the petitioner on a part of the cargo of the "Napoli" contained the following F. C. & S. clause:

> "Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction and the consequences thereof or of any attempt thereat, and also from all consequences of riots, insurrections, hostilities or warlike operations, whether before or after declaration of war, and whether lawful or unlawful, and whether by the act of any belligerant nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise" (Exhibit AA, Record, p. 13).

The respondent's war risk certificate on the same cargo contained the following clause:

> "It is agreed that *this insurance covers* only the risk of capture, seizure, or *destruction, or damage, by* men-of-war, by letters of marque, by takings at sea, arrests, restraints, detainments and *acts of kings, princes and people authorized by and in prosecution of hostilities* between belligerant nations." (The italics are ours.) (Exhibit B, Record, p. 14.)

As stated in the petition, the petitioner and the respondent each paid one-half of the loss resulting from the destruction of the cargo covered by the two policies, each acquiring by subrogation the rights of the assured against the other. The issue in the present case is whether or not the petitioner, standing in the place of the assured, by assignment as well as by subrogation, is

entitled to recover from the respondent Insurance Company which issued the war risk policy. Both the District Court and the Circuit Court of Appeals held that the loss fell on the marine underwriters rather than the war risk underwriters.

POINT I.

The collision which caused the loss of the "Napoli" and her cargo was the proximate and direct result of the "prosecution of hostilities between belligerent nations," and was solely due to the method of navigation prescribed by the naval authorities as an essential of the conduct of the war.

The respondent's policy of war risk insurance provided that

> "This insurance covers * * * destruction, or damage, by * * * acts of kings, princes and people authorized by and in prosecution of hostilities between belligerant nations" (Exhibit B, Record, p. 14).

The loss of the cargo of the "Napoli" was covered by this policy.

To sail in convoy is a warlike operation and is an act done in the prosecution of hostilities.

It is upon this point that the British Courts and Judges have differed. The only British case which directly deals with the matter is that of the *"Matiana"* (1921), 1 A. C. 99 (House of Lords), affirming the decision of the Court of Appeal (1919), 2 K. B., 670, reversing the Trial Court (1919), 1 K. B. 632. It appeared in that case that the *"Matiana"* was insured by the usual marine policy, containing a clause excluding loss caused by war risks similar to that contained

in the policy of the Petitioner herein, and also by a separate war risk policy covering "all consequences of hostilities or warlike operations." While zigzagging under convoy on a dark night, the *"Matiana"* stranded on a reef. No negligence was found. The vicinity of the accident was usually infested with submarines, but none were known to be present at that particular time. The Trial Court held that the loss should fall upon war risk underwriters. The Court of Appeal held that the loss resulted from a marine risk. In the House of Lords the Court was divided, three judges, Lord Atkinson, Lord Sumner and Lord Wrenbury, holding that it was a marine risk, and Viscount Cave and Lord Shaw of Dunfermline dissenting.

Mr. Justice Bailhache, who decided the case in the Trial Court, said (1919, 1 K. B., 632, 636):

> "To sail with convoy is, in my opinion, a warlike operation. The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen and the precautionary measures taken on the voyage must be taken together as all part of a warlike operation. In this case the vessels pursued a zigzag course, and were sailing at the time of the stranding through a submarine-infested area, and some 30 miles to the northward of the ordinary peace time course. The stranding happened in the course of this warlike operation, and, subject to another point made by the war risk underwriters, was directly due to it."

In the House of Lords, Lord Shaw of Dunfermline agreed with the opinion thus expressed, and said (1921, A. C., 99-123):

> "I think that the putting of a vessel under convoy, with all that that involves, is an actual and accomplished change of circumstances and an operation which is conducted in the course of hostili-

> ties or war. The loss of the vessel, in my humble opinion, did arise out of 'the consequence of hostilities or warlike operations,' and the case is therefore free from the scope of a maritime peril and falls within the war risk insured against."

Four of the judges in the Court of Appeal and the House of Lords, who concurred in holding that the loss of the "Matiana" was the result of a marine and not a war risk, held that the sailing in convoy was a warlike or hostile operation as far as the convoying warships was concerned, but that the merchant ships which were being convoyed were not identified with the warships and were not themselves engaged in a warlike undertaking, or in the prosecution of hostilities. Lord Justice Atkin, in the Court of Appeal (1919, 2 K. B. 670, 698) said:

> "It appears to me fallacious to identify the merchant vessels sailing with convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding."

This view was adopted by the majority judges in the House of Lords, and is the basis of the decision. It is the real *ratio decidendi* of the case.

Lord Shaw of Dunfermline, on the other hand, not merely concurred with Mr. Justice Bailhache in stating that the sailing under convey is itself a warlike operation, but held that no distinction could be drawn between the warships which acted as convoy, and merchant ships which were convoyed.

Lord Shaw said (1921, A. C., 99-124-125):

> "I do not doubt that so far as the ships acting as convoy were concerned they were thus con-

ducting a warlike operation. I think the decision in the case of *Ard Coasters Ld.* v. *The King,* to the effect that a warship patrolling in the course of her duty and thereby causing a collision with a merchant vessel, was a right decision. * * * Suppose, in the present case one of the ships acting as convoy had run down one of the ships convoyed, I can hardly doubt that that event would have been similarly found. The case accordingly is narrowed to the distinction between ships which are acting as convoy and ships which are themselves under convoy. I myself see great force in the view which Bailhache, J. so clearly expresses to the effect that all the vessels—those acting as convoy and those under convoy—must be treated as a unity. He concludes accordingly that they were all engaged in warlike operations. I respectfully agree with that learned judge. * * *

I am humbly of opinion that, so far as ships under convoy are concerned, all these ships are, along with the ships acting as convoy, under a unified command, and that command issuing from the commander of the convoy is, as part of the direction of the convoy, a military operation. The consequence of it upon those merchant vessels to whom the command was issued was to place them compulsorily in a situation of peril in which unquestionably they would not have been placed but for the course thus forced upon them."

The Supreme Court of the United States has already considered the status of merchant ships under belligerent convoy and has reached a conclusion in accord with the views expressed by Mr. Justice Bailhache and Lord Shaw, and against those of the majority judges in the House of Lords.

In the case of *The Atalanta,* 3 Wheaton 409, this Court held that a neutral cargo, found on board an armed enemy's vessel, is not liable to condemnation as prize of war. Mr. Justice Johnson, however, in a very

carefully considered opinion, drew a distinction between the case of neutral cargo shipped on an armed enemy's vessel, and the case of a merchant vessel which accepts the protection of a belligerent convoy. Mr. Justice Johnson said (p. 423):

> "*A convoy is an association for a hostile object;* in undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and *by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine,* and adds to the numerical, if not to the real, strength of the convoy. * * * To elucidate this idea, let us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war, which would otherwise take men from the ranks; and the reason will be obvious, why he should be treated as a prisoner of war, and involved in the fate of a conquered enemy." (The italics are ours.)

This language follows the dictum in the dissenting opinion of Mr. Justice Story in *The Nereide,* 9 Cranch 388-445.

Mr. Justice Story says:

> "On the whole, on this point, my judgment is, that the act of sailing under belligerent or neutral convoy is, of itself, a violation of neutrality, and the ship and cargo, if caught *in delicto,* are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still, that the resistance of the convoy is, to all purposes, the resistance of the associated fleet."

The language above quoted from both *The Atalanta* and *The Nereide,* was dictum, but it has been adopted as the law of this country.

In *The Ship Galen* v. *The United States* (37 Court of Claims, 89), it appeared that an American merchant ship had sailed from England under British convoy. Nine days after leaving the convoy she was captured by a French Privateer. In holding that the vessel was not subject to condemnation under the Law of Nations, in view of the fact that she had left the convoy, the Court said:

> "The true reason why a vessel captured while sailing under convoy is liable to condemnation is that *she has for the time being allied herself with the enemy; she has become part of the hostile whole.* * * * She is, for the time, a vessel which must be known by the company she keeps.
>
> Figuratively speaking again, when she joins the convoy, and as long as she continues with it, she has hauled down her neutral flag and is sailing under the flag of the convoy. It is too late when she falls into the hands of her captor to run up her own flag. The right of capture (not of search) rests upon the fact that she is then a *part of a hostile force.* Mr. Justice Johnson, in *The 'Atalanta'* (3 Wheat., R., 409, 424), clearly illustrates the true ground of a vessel's liability when he likened her to a neutral citizen who enlists in the army of a belligerent and is taken prisoner of war, and who is thereby 'involved in the fate of a conquered enemy'." (The italics are ours.)

To the same effect see *The Schooner Nancy* (27 Court of Claims, 99) and *The Black Sea Nymph* (36 Court of Claims, 369).

Mr. Woolsey, in his work on *International Law*, 4th Edition, Section 193, page 329, in discussing merchant ships which sail in convoy, says:

> "Upon the whole, the intention to screen the vessels behind the enemy's guns, is so obvious, that the act must be pronounced to be a decided departure from the line of neutrality, and one which may justly entail confiscation on the offending party."

1 Kents, Commentaries, 4th Edition, Section 155, page 154, Part I, Lecture 7:

> "The very act of sailing under the protection of a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality."

In defining "convoy," it is stated in 13 *Corpus Juris,* 931, that

> "it (a convoy) is an association for a hostile object."

Moore, in Volume 7 of his *International Law Digest,* page 494, quotes the dictum of Mr. Justice Story in *The "Nereide"* (*supra*), as stating the law of this country at the present time, in regard to the status of merchant ships in convoy.

The British Courts have never doubted that collision during war time between a merchant vessel and a war ship is the result of warlike operations and that the loss falls on war risk underwriters. In *"The Richard de Larringa"; Attorney General* v. *Ard Coasters* (1921), 2 A. C. 141, affirming decisions in the Court of Appeal, 36 T. L. R. 555, which affirmed decisions in the Court of King's Bench (1920), 3 K. B. 65, it appeared that a merchant vessel collided at night with a British destroyer which was searching for submarines. Neither had lights, but neither was held to be at fault. The House of Lords held that the collision was due to warlike operations. This decision was specifically approved by the majority judges in the House of Lords in the *Matiana,* who distinguished the case merely on the ground that "the sheep are not the sheppard," that "it is fallacious to identify the merchant vessels sailing with convoy with the warships that escort them."

In *"The St. Oswald"; British & Foreign Steamship Company* v. *Rex* [1918] 2 K. B. 879, (a decision of the

Court of Appeal, affirming the decision of Rowlatt, J. in [1917] 2 K. B. 769), it appeared that the "St. Oswald" was under Admiralty charter T-99, providing that the master was to obey all orders from the Admiralty or naval officers and that the Admiralty took the risk of

> "all consequences of hostilities or warlike operations."

The *St. Oswald,* in accordance with Admiralty orders, was steaming on a dark night, with her lights obscured when she sighted the French warship "Suffren," which was also steaming without lights but almost immediately disclosed them. The "St. Oswald" ported her helm and the battleship starboarded, resulting in a collision. Neither vessel was held at fault. The British Court of Appeal held that the Admiralty was liable, since the loss was a consequence of warlike operations and did not result from a marine risk.

In view of the approval of the *Richard de Larrinaga* case expressed by the majority judges of the House of Lords, there can be no doubt that those judges would have held war risk underwriters liable in the *Matiana* case, if that vessel had collided with one of the convoying war ships. It was expressly so stated by Lord Shaw of Dunfermline (1921, A. C., at p. 124). Accordingly, as stated above, the real basis of the "Matiana" decision is that the merchant ships in a convoy are not identified in any way with the convoying warships; the convoying warships being engaged in a warlike operation in the prosecution of hostilities, but the merchant ships being engaged in the peaceful operations for which they were designed.

Compare this holding, and the statement of the majority judges that "it is fallacious to identify the merchant vessels sailing with convoy with the warships that escort them," with the statement of this Court in *"The Atalanta"* that *"a convoy is an association for a hostile*

object" and that "*by joining a convoy, every individual ship puts off her pacific character, and undertakes the discharge of duties which belong only to the military marine.*" Can there be any doubt that this Court, if it adhered to its previous rulings, would have decided the *Matiana* case as did the minority judges and would have held war risk underwriters liable? Can there be any doubt that this Court has already passed upon the matter from "the standpoint of reason" and "the large and commonsense view of the situation," which Judge Hough in the District Court lamented he was not free to adopt because of the *Matiana* decision?

The Petersham; British Steamship Company v. *The King* (1921), A. C. 99, relied on by both the District Court and the Circuit Court of Appeals in arriving at the present decision, is not in point, since neither of the colliding vessels involved in that case was in convoy at the time of the collision.

Two further points should be noted in the present case. The first is that both the "Napoli" and the "Lamington," as well as the convoys of which they formed parts, were proceeding on a dark night without lights. It is now apparently the law in England, that sailing without lights is not of itself a warlike operation and is not an act done in prosecution of hostilities and that consequently a resulting loss does not fall on war risk underwriters.

> *The Petersham; British Steamship Company* v. *The King*, 1921, A. C. 99;
> *Ionides* v. *Universal Marine Insurance Co.*, 14 C. B. (N. S.) 259.—143 English Reprints 445.

When the *Petersham* case was before the trial court, however (1919, 1 K. B. 575, 581), Mr. Justice Bailhache said by way of dictum that in his opinion the removal of coast lights was a warlike operation, and that accord-

ingly a resulting loss would be covered by a war risk policy. Mr. Justice Roche, in the case of *Inui Gomei Kaisha* v. *Attolico,* reported in Lloyds List, July 20, 1918, at page 7, held, by way of dictum, that sailing without lights at night in defiance of the rules of navigation was a warlike operation; and in the *St. Oswald* case, (*supra*), the act of sailing without lights was one of the points which the Court emphasized in arriving at its decision that the loss of the vessel was the result of a war risk. Judge Hough, in deciding the present case in the District Court, stated that he agreed with the reasoning of Mr. Justice Bailhache in the *Petersham* case, although he did not feel free to follow it (Record, fol. 796-7). The point is not essential to the present case, since sailing in convoy is itself a warlike operation. The fact that both the "Napoli" and the "Lamington" were without lights, however, is a fact to which, we submit, weight should be given.

The other point which we ask the Court to note, is that the "Napoli" was carrying war supplies and munitions to an Army and Navy base for use in the war. It is undisputed that a substantial portion of her cargo consisted of munitions and supplies consigned to the Italian Army and other governmental authorities for use in war (fols. 694, *et seq.*). On this point the present case is undistinguishable from two of the recent decisions in England.

In P. & O. Branch Service v. *Commonwealth Shipping Representative,* 38 T. L. R. 93 (affirmed by the Court of Appeal, 38 T. L. R. 433-434; 10 Lloyds List 514); the decision of Mr. Justice Bailhache is reported as follows:

> "But the arbitrator found that in going from Mudros to Alexandria the 'Bonvilston' was going from one military base to another. She was carrying ambulance wagons, which were intended for the use of soldiers, and that appeared to be

> as much a warlike operation as the conveyance of soldiers would be. He held, therefore, that the 'Bonvilston' at least was engaged in a warlike operation, and the loss of the "Geelong' was therefore the result of a war risk, and not a marine risk."

The above decision was followed by Mr. Justice Rowlatt, in *Atlantic Transport Co.* v. *Director of Transports* (38 T. L. R. 160).

The point of these decisions is not so much that carrying contraband enhanced the risk of being sunk by a submarine (as stated by the District Court, fol. 774) as that carrying munitions and supplies to an army base is a warlike operation in itself, and therefore any resulting collision is the result of a warlike operation as defined in the *Matiana* and *Richard de Larrinaga* cases. This point also should be considered primarily in connection with the fact that the "Napoli" was sailing in convoy and as adding weight to the conclusion that sailing in convoy is a warlike operation.

The only other question in the case is one of causation. It cannot be doubted that the cause of the collision in the present case was that the vessels were sailing in convoy under naval control, without lights on a dark night and were parts of such large and unwieldly fleets that a collision could not be avoided when the presence of the two fleets became known to each other. None of the judges either in the District Court nor in the Circuit Court of Appeals has doubted this fact, the decision in both Courts below being based solely on the ground that sailing in convoy is not a warlike operation, or an act done in the prosecution of hostilities. That the sailing in convoy was the proximate and efficient cause of the loss has not and cannot be doubted.

CONCLUSION.

There is presented in this case the question of the status of merchant vessels in convoy, and the question of whether or not sailing in convoy without lights and in the course of transporting munitions of war, is a warlike operation or an operation done in the prosecution of hostilities. The question is one of great importance, both from the standpoint of commercial and international law. Both the District Court and the Circuit Court of Appeals have decided the case against their own views, feeling bound by a three to two decision of the House of Lords. Neither Court has discussed either the case of "The Atalanta" or the case of "The Nereide" in which this Court has expressed views diametrically opposed to those of the majority of the House of Lords in the cases relied on below.

We therefore submit that this is a proper case for the issue of a Writ of Certiorari.

Respectfully submitted,

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Attorneys for Petitioner.

Dated, New York, September 1st, 1922.

SUPREME COURT OF THE UNITED STATES

THE QUEEN INSURANCE COMPANY OF AMERICA (Libellant below),
Petitioner,

AGAINST

GLOBE & RUTGERS FIRE INSURANCE COMPANY (Respondent below),
Respondent.

No. 579
October Term,
1922

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

It is a sufficient answer to this petition that both the District Court and the Circuit Court of Appeals found as a fact that the proximate cause of the collision was negligent navigation. The District Court, by Hough, *C. J.*, said:

"It is my opinion, and I find from the material furnished, that both the vessels here involved navigated faultily; the Napoli in that having ported to such an extent that she ought to have known she was getting in the way of the next fore and aft convoy line, stopped and (as it seems to me) invited collision with any vessel in that line that came up out of the night; while the Lamington was at fault for maintaining so great a speed that she could not possibly take off her way before colliding with whatever she could clearly make out ahead" (Record. p. 254).

Summarizing his conclusions at the close of his opinion, he reiterated this view:

"It is my personal opinion on this record that, acknowledging the danger in which these two convoys found themselves at midnight of July 4, 1918, the navigators of both Napoli and Lamington failed in their ship-management to exercise the ordinary care and skill of their calling. Therefore such negligence was the proximate cause of collision and the loss must fall upon the marine underwriters" (Record, p. 268).

In the Circuit Court of Appeals, Judge Manton, who delivered the opinion of the Court, said:

"The District Court held that both the navigators of the Napoli and the Lamington 'failed in their ship management to exercise the ordinary care and skill of their calling' and concluded that the proximate cause of the collision must therefore fall upon the marine underwriters. An examination of such testimony as has been offered leads us to agree with this conclusion. Mr. Justice Hill, who considered the case in the British courts in a suit by the owners of the cargo on the Napoli against the owner of the Lamington (the opinion is part of the record), found no fault on the part of the Lamington but said that 'the immediate cause of the collision was the porting of the Napoli and nothing else.' Both judges have concluded that it was the faulty navigation which brought about the collision and not a warlike operation" (Record, pp. 290-291).

Accordingly, on this finding of fact by both courts below the loss necessarily falls on the marine underwriters and the libel was properly dismissed.

Any expression of opinion on other points argued becomes *obiter*. But it must be observed that on the other grounds discussed all four judges who participated in the decision of the case in the courts below agreed in the conclusion that the libel must be dismissed—two on the

ground that sailing in convoy without lights was not a warlike operation, and two on the ground that the necessity of uniformity in the commercial world was a sufficient reason for following the construction now firmly established in English law.

The new matter on which the petitioner relies is wholly ineffective. The passages quoted from the opinion by Mr. Justice Johnson in *The Atalanta,* 3 Wh. 409, and by Mr. Justice Story in *The Nereide,* 9 Cr. 388, relate to an entirely different issue, namely, the distinction between neutral and belligerent status. But the distinction between convoyed merchantmen and their escort has been recognized from the earliest days of maritime warfare; it is recognized in the definition of convoy in 13 Corpus Juris 931, from which the petitioner quotes the last clause. The roles of the two classes of ships are entirely different. That of the ships of war is protective and, if need be, combative; that of the merchantmen is not at all combative, and, as far as the circumstances permit, is as peaceful in character as would be their enterprises in time of peace. As Lord Justice Atkin said in the *Matiana* case, (1919) 2 K. B. 670, the sheep are not the shepherd and are not engaged in the operation of shepherding.

A much more important decision of this Court, and the only one in fact which bears directly upon this case, is *Morgan* v. *United States,* 14 Wall. 531 (more fully reported in 8 Court of Claims Reports, 18). This case distinctly repudiates the conclusion reached by the two minority judges in the House of Lords in the *Matiana* case, [1921] A. C. 99, namely, that the order of the convoy commander in prescribing the dangerous course was the cause of the loss. In the *Morgan* case it appears that the

owner of a vessel had chartered her to the Government during the Civil War. The vessel was manned by the owner; the Quartermaster's Department, United States Army, directed how she should be loaded and where she should go. The charterparty provided: "The war risk to be borne by the United States. The marine risk to be borne by the owners." The vessel took on board at Brazos, Texas, troops and stores for immediate transportation to New Orleans. The bar at the mouth of the harbor was difficult and dangerous; when the vessel was ready to proceed the wind was high and the water low. The quartermaster in authority at Brazos ordered a government tug to aid in taking the vessel over the bar; but she struck bottom, swung round inside the bar, and returned to her landing. The quartermaster, nevertheless, again ordered the vessel to proceed to sea. This order was given with full knowledge of the danger of crossing the bar, and against the judgment of both the master of the vessel and the pilot; but the exigencies of the service, in the judgment of the quartermaster, required the attempt to be made. The master, under this order of the quartermaster, again attempted to go out, but the vessel struck heavily, and was damaged so much that, after discharging the troops and stores, she had to be towed to New Orleans. The Court held that the owner, not the government, must bear the loss:

"If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience

to the rule *'causa proxima non remota spectatur'* we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel."

This case was cited with approval by this Court as recently as *New Orleans-Belize Royal Mail and Central American Steamship Co.* v. *United States,* 239 U. S. 202, 206. We submit that it disposes completely of the ground upon which the dissent in the convoy case is based.

The petitioner's argument ignores the fundamental distinction between causes and conditions. Not all acts in time of war are warlike. As Lord Justice Atkins said in the *Petersham* case, (1919) 2 K. B. 670:

"It is true that the voyage is performed in war time and under war conditions. It is an operation in war, but not a warlike operation. Like many other peaceful operations conducted in time of war, it is conducted under different conditions to those of peace. The risks are increased; the risk of collision by sailing without lights; the risk of stranding by sailing on unaccustomed routes; the risk of foundering by difficulties in securing, when needed, necessary repairs. But to increase marine perils by reason of war is not to convert them into war perils."

The petitioner's theory seems to be that indirect assistance given to the furtherance of war interests is in itself a warlike operation. But in marine insurance we are concerned with proximate, not with remote causes; and once this principle is overlooked there is no stopping place short of the conclusion that in a legal, as well as in the "large sense" referred to by Judge Hough, "every act of the warring countries after the home-staying population was fed, clothed and sheltered, was but a mani-

festation of war." If indirect assistance to the successful prosecution of war is a warlike operation, then every subscriber to the Liberty Loans was engaged in a warlike operation.

It is respectfully submitted that the petition should be denied.

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